

**Czeladnicki v Levy**

2013 NY Slip Op 31708(U)

July 8, 2013

Sup Ct, Suffolk County

Docket Number: 11-34432

Judge: Denise F. Molia

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INDEX No. 11-34432  
CAL No. 12-02230MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 39 - SUFFOLK COUNTY

**PRESENT:**

Hon. DENISE F. MOLIA  
Acting Justice of the Supreme Court

MOTION DATE 4-23-13  
ADJ. DATE 5-24-13  
Mot. Seq. # 001 - MD

-----X

PAUL I. CZELADNICKI,  
  
Plaintiff,

- against -

BRIAN LEVY,  
  
Defendant.

-----X

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Upon the following papers numbered 1 to 29 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-13; 14; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 15- 29; Replying Affidavits and supporting papers   ; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that motion (001) by the plaintiff, Paul I. Czeladnicki, pursuant to CPLR 3212 for summary judgment in his favor on the issue of liability is denied.

In this negligence action, Paul I. Czeladnicki seeks damages for injuries he allegedly sustained on August 17, 2011, on Steers Avenue at or near the intersection with Cairo Avenue, Northport, New York, when he was riding his bicycle and was struck by a vehicle operated by defendant Brian Levy. A derivative action has been pleaded on behalf of Judith Czeladnicki, plaintiff's spouse.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires

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denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of motion (001), the plaintiff has submitted, inter alia, an attorney’s affirmation; copies of the summons and complaint, defendant’s answer, plaintiff’s bill of particulars; plaintiff’s affidavit; signed and certified transcripts of the examinations before trial of Paul Czeladnicki dated July 16, 2012 and Brian Levy dated August 2, 2012; photographs; and an uncertified copy of the police MVA 104 accident report. Initially, the Court notes that the unsworn MV-104 police accident report constitutes hearsay and is inadmissible (*see Lacagnino v Gonzalez*, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; *Hegy v Coller*, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

In order to set forth a prima facie case of negligence, the plaintiff’s evidence must establish (1) the existence of a duty on defendant’s part as to plaintiff; (2) a breach of this duty; and (3) that such breach was a substantial cause of the resulting injury (*Merino v New York City Transit Authority*, 218 AD2d 451, 639 NYS2d 784 [1st Dept 1996]). A duty of reasonable care owed by a tortfeasor to an injured party is elemental to any recovery in negligence, and the scope and existence of an alleged tortfeasor’s duty is a legal declaration reserved for judges to make prior to submitting anything to fact-finding (*Palka v Servicemaster Management Services Corporation*, 83 NY2d 579, 611 NYS2d 818 [1994]). Here, it is determined as a matter of law that the defendant driver owed a duty of reasonable care to the plaintiff bicyclist on the roadway. However, there are factual issues concerning the happening of the accident and whether the defendant breached his duty to the plaintiff.

Paul I. Czeladnicki averred that he is an experienced cyclist, and as of August 17, 2011, had been riding for approximately thirty-two years. He rode through his neighborhood in Northport two to three times a week on an average of ten miles per ride for years and was very familiar with the route that he took. His typical route ended with his traveling northbound on Cairo Avenue across its intersection with Steers Avenue, then continuing onto Clipper Drive to his home. On August 17, 2011, he was wearing his helmet and rode his bike in his neighborhood from approximately 5:45 p.m. to 6:35 p.m, when he was struck by defendant’s car. He was nearing the end of his ride, and had traveled about ten miles when he pedaled northbound on Cairo Avenue. He began decelerating when he was approximately two car lengths from the stop sign on Cairo Avenue. He positioned himself one foot to the left of the curb so as to enable himself to put his right foot on the curb once he unhooked it from the bike pedal by simply moving his foot. When he was two car lengths from the stop sign, he looked to his right and up Steers and saw a car coming down the hill on Steers. It did not appear to be slowing down as it approached the intersection, so he did not assume the car would stop at the stop sign. He observed that car pass the stop sign on Steers without stopping, and then saw it make a left turn onto Cairo without it first fully entering the intersection as it should have. Instead, the driver turned the car on an angle from Steers and cut into the northbound lane on Cairo and struck him. At no time prior to

striking him, did the car stop, slow, or sound its horn. Czeladnicki averred that when he was struck by the defendant's car, he had not reached the stop sign and his bicycle was one foot to the left of the curb. When he realized that he was going to be struck, he tried to move to his right to protect himself, but could not move out of the way as the left side of the car drove onto his lane of travel and the driver's side mirror hit him and shattered his left wrist. He was thrown to the ground on his back with his head close to the curb and stop line.

At his deposition, the plaintiff testified that he was a licensed driver and was familiar with the rules of the road for driving and biking, and that drivers and bikers have the same rights and obligations. He described Cairo Avenue as having one travel lane in each direction, north and south. He continued that the accident occurred at the stop mark in the road while he was traveling in a northbound direction. The stop line is about two to three feet past the stop sign. The accident occurred between the stop line and the stop sign. He was coming to a stop at the stop line on Cairo, but was not fully stopped when he was hit. His bike was about one foot from the curb to his right on his side of the road when he was struck. He saw the defendant's car as it made a turn into his travel lane, striking him, and stated that the defendant did not stop at the stop sign before making the turn onto Cairo. He also testified that he does not ride in the middle of the road because cars can approach from behind very quickly, so he would stay to the right. At the intersection, he had an unobstructed sight-line to the cars coming down Steers.

Brian Levy testified to the extent that he was involved in an incident on August 17, 2011 while he was operating his car which made contact with a person riding a bicycle, when his driver's side side-view mirror struck the plaintiff. He was traveling west on Steers Avenue. At the bottom of Steers was a hill and to the left was the intersection with Cairo Avenue, a two-way street which runs north and south. He was making a left turn from Steers onto Cairo Avenue when the accident occurred. He had a stop sign in his travel direction at the bottom of Steers. He did not know what speed he was traveling on Steers, or if there were any cars traveling ahead or behind him, or if any passed him from the opposite direction. He stated that he had no clear view of the intersection of Steers and Cairo due to the trees on Steers unless he was at the stop sign or past the stop sign, and that he had to go into the intersection to get a better view. As he came down the hill on Steers, approaching the stop sign, he was looking straight ahead and did not see anything. He stated that he stopped at the stop sign "briefly" for a full stop, for two seconds, but did not know if he stopped at the stop sign or forward of the stop line, but he entered the intersection. While he was stopped for those two seconds, he continued to look straight, looked to the left and looked to the right, and did not observe any vehicle, parked or moving. He did not see any pedestrians when he was stopped or during the accident. He then testified that he may have been rolling while he was stopped at the stop sign at Steers. He saw enough of Cairo to feel comfortable enough to make the left turn, and stated that you have to be about 3/4 through the intersection to see straight down Cairo, and he was not three quarters into the intersection when he turned. He thought he had put his turn signal on at the bottom of the hill. He was about three quarters of the way into the left turn in the intersection when he heard a loud "woe" and felt a contact. At that point, he thought his vehicle was in the eastbound lane of Steers heading into the southbound lane of Cairo. He continued that almost his entire car was in the eastbound lane of Steers traveling about twenty miles per hour when the contact occurred. No part of his car entered onto Cairo when the

contact occurred. No portion of his car was in the northbound lane of Cairo when the contact occurred, but his tires were angled to the left. After the contact, he applied his brakes and came to a stop on Cairo in the southbound lane. He immediately pulled his car over, put his flashers on, and saw the plaintiff on the ground next to his bicycle in a lot of pain. He stated that as an attorney, he was aware of the requirement to file an MV 104 with the Department of Motor Vehicles, however, he did not file one. He testified that it was a gorgeous evening at about 6:30 when the accident occurred.

New York Vehicle and Traffic Law § 1146 requires every driver to exercise due care to avoid colliding with any pedestrian upon any roadway. Thus, the defendant had an obligation to obey both Vehicle and Traffic Law §§ 1146 and 1173. While the term “due care” is not defined in the statute, the cases connote a standard of reasonableness under the circumstances. Due care is that care which is exercised by reasonably prudent drivers. It is not that degree of care which guarantees that a driver will avoid any accident no matter what the circumstances might be (*see Russell v Adduci*, 140 AD2d 844, 528 NYS2d 232 [3d Dept 1988]). Here, there are factual issues which preclude summary judgment concerning whether the defendant exercised due care while operating his motor vehicle at the intersection as he was executing his turn.

A defendant driver is bound to see what, with proper use of his senses, he should have seen (*Ambrecht v Town of Brookhaven*, 2013 NY Slip Op 30711(u) [Sup. Ct. Suffolk County]; *Avila v Mellen*, 131 AD2d 408, 515 NYS2d 856 [2d Dept 1987]). The defendant testified that he did not see the plaintiff at any time prior to the accident and thus failed to observe what he should have seen with the proper use of his senses.

Vehicle and Traffic Law § 1160 (b) provides in relevant part that at any intersection where traffic is permitted to move in both directions on each roadway entering the intersection, an approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and by passing to the right of such center line where it enters the intersection and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered (*see Marafioti v Reisman*, 2008 NY Slip Op 30654(U) [Sup. Ct., Nassau County]). Here, there are factual issues concerning whether the defendant comported with this statute. The defendant testified that the contact occurred in the intersection before he turned onto Steers. The plaintiff testified that the accident occurred when the defendant crossed into the northbound travel lane striking him as the defendant turned left to travel southbound on Cairo. The plaintiff testified that he was not in the intersection at the time of impact and was over to the right side of the northbound travel lane on Cairo at the stop line. The defendant testified that he was not three quarters into the intersection when he turned.

There are factual issues concerning whether or not the defendant violated Vehicle and Traffic Law § 1142 (a) and § 1172 (a) by failing to yield the right of way to the plaintiff as it is undisputed that the plaintiff was already stopped at the stop sign on Cairo Avenue when the defendant entered into the intersection and began making his left turn. There are factual issues concerning whether or not the defendant stopped at the stop sign on Steers as defendant testified that he did for two seconds and rolled into the intersection. The plaintiff testified that the defendant did not stop at the stop sign on

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Steers prior to making his left turn onto Cairo. The plaintiff testified that there is a clear sight line from Cairo onto Steers at the intersection, whereas the defendant testified that he could not see down Cairo until he was 3/4 of the way into the intersection. These factual issues preclude summary judgment and present issues of credibility for jury determination.

Accordingly, motion (001) by the plaintiff for summary judgment in his favor on the issue of liability is denied.

Dated: July 8, 2013

**Hon. Dennis F. Molina**  
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A.J.S.C.

         FINAL DISPOSITION      X   NON-FINAL DISPOSITION